Supreme Court, U.S.
FILED
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(2)

No. 94-818

In the Supreme Court of the United States

OCTOBER TERM, 1994

HERCULES, INCORPORATED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID S. FISHBACK
ALFRED R. MOLLIN
MICHAEL T. McCAUL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether supply contracts between the United States and petitioners included an implied-in-fact obligation on the part of the United States to reimburse petitioners for the cost of litigating and settling certain third-party product liability claims.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	24

TABLE OF AUTHORITIES

Cases:

"Agent Orange" Product Liability Litigation, In re:
506 F. Supp. 762 (E.D.N.Y. 1980) 16
565 F. Supp. 1263 (E.D.N.Y. 1983) 3, 16
597 F. Supp. 740 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988) 10, 14, 16, 22
611 F. Supp. 1221 (E.D.N.Y. 1985), aff'd, 818 F.2d 204 (2d Cir. 1987) 10
611 F. Supp. 1223 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988) 10, 15, 16
818 F.2d 145 (2d Cir. 1987), aff'g 597 F. Supp. 740 (E.D.N.Y. 1984), cert. denied, 484 U.S. 1004 (1988) 3, 4, 15
818 F.2d 204 (2d Cir. 1987) 5, 17
Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988) 17, 19
Eastern Air Lines, Inc. v. *McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) 22
Feres v. *United States*, 340 U.S. 135 (1950) 13
Hatzlachh Supply Co. v. *United States*, 444 U.S. 460 (1980) 11
Ivy v. *Diamond Shamrock Chemicals Co. (In re "Agent Orange" Product Liability Litigation)*, 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994) 15, 16

Cases—Continued: Page

Lopez v. *A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir. 1988), cert. denied, 491 U.S. 904 (1989) 11
Parfait v. *Janhcke Service, Inc.*, 484 F.2d 296 (5th Cir. 1973), cert. denied, 415 U.S. 957 (1974) 20
Stencel Aero Eng'g Corp. v. *United States*, 431 U.S. 666 (1977) 13, 19
Tankrederiet Gefion A/S v. *Hyman-Michaels Co.*, 406 F.2d 1039 (6th Cir. 1969) 20
United States v. *Spearin*, 248 U.S. 132 (1918) 11, 12
United States v. *Vertac Chemical Corp.*, Nos. 94-1946 etc. (8th Cir. Jan. 31, 1995) 21, 22
Whisenant v. *Brewster-Bartle Offshore Co.*, 446 F.2d 394 (5th Cir. 1971), cert. denied, 415 U.S. 957 (1974) 20

Statutes:

Anti-Deficiency Act, 31 U.S.C. 1341 *et seq.*:
31 U.S.C. 1341 (1988 & Supp. V 1993) 6, 23
31 U.S.C. 1341(a)(1)(B) (1988 & Supp. V 1993) 14
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 14
42 U.S.C. 9619 13
Defense Production Act, 50 U.S.C. App. 2061 *et seq.* 5
§ 101, 50 U.S.C. App. 2071 (1988 & Supp. V 1993) 22
§ 101(a), 50 U.S.C. App. 2071(a) (1988 & Supp. V 1993) 8
§ 101(a)(1), 50 U.S.C. App. 2071(a)(1) (1988 & Supp. V 1993) 21
§ 707, 50 U.S.C. App. 2157 ..... 6, 8, 9, 20, 21, 22, 23
28 U.S.C. 1491 (1988 & Supp. V 1993) 12
42 U.S.C. 2210(d) 13
42 U.S.C. 2210(h) 13
50 U.S.C. 1431 (1988 & Supp. V 1993) 14

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 24 F.3d 188. The opinions of the United States Claims Court (now the Court of Federal Claims) (Pet. App. 47a-80a, 82a-115a) are reported at 25 Cl. Ct. 616 and 26 Cl. Ct. 17.

JURISDICTION

The judgment of the court of appeals (Pet. App. 121a) was entered on May 4, 1994. Petitions for rehearing were denied on July 7, 1994. Pet. App. 117a-120a. On September 26, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 4,

1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1964 and 1968 the United States purchased quantities of the defoliant Agent Orange from several herbicide manufacturers, including petitioners. Pet. App. 3a; C.A. App. 464-482, 573-618. The defoliant was produced in accordance with government specifications and was used, as the manufacturers were aware it would be, in fighting the Vietnam War. See Pet. App. 49a-50a, 84a-85a. The relevant procurement contracts contained no express warranty or indemnification provisions. *Id.* at 19a n.8.

Depending on how it is produced, Agent Orange may contain varying amounts of a toxic by-product known as dioxin.[1] Pet. App. 3a. Beginning in 1979, a number of Vietnam veterans and their families sued the manufacturers of Agent Orange, including petitioners, seeking compensation for injuries allegedly caused by exposure to the defoliant during the war. Despite the ensuing litigation and years of investigation and controversy, it has never been established that exposure to dioxin caused the various

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[1] The courts below made no findings on the emergence, over time, of concerns about the possible hazards of dioxin. There is no doubt, however, that the larger manufacturers of Agent Orange developed considerable knowledge in that regard. Indeed, petitioner Hercules altered its production methods to eliminate dioxin following a meeting called by Dow Chemical Company in 1965. The government was not informed of or invited to attend that meeting. Pet. App. 4a, 49a-50a & n.5.

injuries alleged by the plaintiffs in those actions. See Pet. App. 48a n.2, 64a-65a, 83a n.2, 97a-98a.

The Agent Orange cases were consolidated in the Eastern District of New York. In 1983, Judge Pratt, sitting by designation after his elevation to the court of appeals, granted motions for summary judgment in favor of several of the defendants, including petitioners, based in part on the government contractor defense. Pet. App. 4a-6a; *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1275 (E.D.N.Y. 1983). That defense generally shields from third-party tort liability contractors who follow detailed government specifications, who know no more than the government about any hazards those specifications may present, and who do not withhold any relevant information from the government. See, *e.g.*, Pet. App. 5a-6a, 21a-22a. Judge Pratt did not sign formal judgments of dismissal to implement the summary judgment, however, and the cases were subsequently reassigned to Chief Judge Weinstein.

Chief Judge Weinstein reconsidered and denied the defendants' motions for summary judgment, and set the case for trial. See Pet. App. 7a, 36a n.2. On the eve of trial the parties entered into a settlement calling for a total payment of $180 million, to which each defendant contributed based on its share of the total volume of Agent Orange produced, adjusted for the level of dioxin in its product. *Id.* at 7a. The United States was not a party to the settlement, took no part in the settlement discussions, and expressed no view on the applicability of the government contractor defense in the settled cases. See Pet. App. 114a-115a; *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 160 (2d Cir. 1987). Petitioner Hercules' share of the settlement payment was approxi-

mately $18.8 million; petitioner Thompson's share was approximately $3.1 million. Pet. App. 7a. In affirming the settlement, which it characterized as "essentially a payment of nuisance value" by the defendants, the Second Circuit observed that the district judge "clear[ly] * * * viewed the plaintiffs' case as so weak as to be virtually baseless." *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 151, 171 (2d Cir. 1987), aff'g 597 F. Supp. 740 (E.D.N.Y. 1984), cert. denied, 484 U.S. 1004 (1988).

Nearly 300 plaintiffs opted out of the Agent Orange settlement. Pet. App. 7a. Chief Judge Weinstein subsequently granted summary judgment against the non-settling plaintiffs, "primarily on the ground that the plaintiffs had failed to present credible evidence of a causal link between exposure to Agent Orange and the plaintiffs' alleged injuries," and alternatively because "the defendant companies were insulated from liability by the government contractor defense." [2]

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[2] During the opt-out litigation, the United States argued that the applicability of the government contractor defense in those cases should not be resolved on the pending motion for summary judgment. The government did not question the availability of the defense in appropriate circumstances. Rather, the government argued that the defense should not apply to claims of negligent manufacturing of defective goods under government contracts, and that there were remaining factual issues, requiring at least further discovery, with respect to each element of the defense: whether the government "established the specifications" for Agent Orange with respect to the presence of dioxin, whether the Agent Orange produced by various manufacturers actually met the government's specifications, and whether particular manufacturers were aware of possible product hazards of which they failed to apprise the government. See C.A. App. 662-697; Pet. App. 104a, 113a-115a.

Id. at 8a. In related rulings, the district court and the Second Circuit also rejected third-party claims by the manufacturers, including petitioners, against the government, seeking tort-law indemnification for or contribution to the settlement. See *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 204 (1987).

2. Petitioners filed separate breach-of-contract actions against the United States, once again seeking reimbursement for the costs of litigating and settling the Agent Orange litigation. See Pet. App. 9a. Both petitioners alleged that the government had made and breached an implied warranty of specifications with respect to Agent Orange. See *id.* at 9a-10a. Petitioner Thompson also contended that the government had an implied obligation to indemnify Thompson because Thompson's manufacture of Agent Orange was compelled by the government under the Defense Production Act (DPA), 50 U.S.C. App. 2061 *et seq.* Pet. App. 10a.[3]

The Claims Court (now the Court of Federal Claims) granted summary judgment in favor of the United States.[4] The court concluded (Pet. App. 64a-

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[3] Both petitioners also alleged breach of an implied obligation to divulge superior knowledge of intended uses and risks. In addition, petitioner Hercules alleged breach of implied obligations to act in good faith and to exercise due care in the use of Agent Orange. Pet. App. 9a-10a. The courts below rejected those contentions. *Id.* at 15a-16a, 25a-27a, 56a-60a, 91a-92a. Because petitioners do not renew them in this Court, we do not discuss them further here.

[4] While petitioners correctly state that no discovery was taken in the Claims Court actions (Pet. 8), they fail to note that the parties presented to the court undisputed documents and testimony from discovery in the extensive Agent Orange

68a, 96a-99a) that even if a warranty of specifications were implied, the course of prior judicial proceedings indicated that petitioners could not prove the existence of damages caused by an injurious defect in the government's specifications, because it had not been established that the tort plaintiffs were harmed by Agent Orange. Moreover, the court held (*id.* at 67a-68a, 99a-100a) that there could have been no breach of any warranty of specifications, "because the manufacturer, under the circumstances alleged, was protected from liability by the Government contractor defense." *Id.* at 68a, 100a. The court also held (*id.* at 78a-79a, 102a-103a) that to the extent petitioners' claims depended on implied indemnities in their government contracts, they were barred by the Anti-Deficiency Act, 31 U.S.C. 1341. That Act provides that officers and employees of the United States may not normally authorize expenditures in excess of funds already appropriated by Congress.

The court also rejected (Pet. App. 100a-102a) petitioner Thompson's argument that a contractual indemnity should be implied on the basis of the Defense Production Act.[5] Section 707 of that Act, 50 U.S.C. App. 2157, provides in part that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to [the DPA]." The court held that Section 707 provides only a defense to actions claiming

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litigation before the district court in New York. See, *e.g.*, C.A. App. 263-421.

[5] Petitioner Hercules did not rely on the DPA before either the Claims Court or the Federal Circuit. See Pet. App. 14a, 28a.

breach of non-government contracts adversely affected by the priority that is accorded to government orders under the DPA, not an indemnity for tort damages paid to third parties injured by products manufactured under such orders.

Finally, the court determined that petitioners' claims were fundamentally inconsistent with the government contractor defense. Pet. App. 68a-78a, 104a-115a. The court agreed with the government (*id.* at 75a-76a, 110a-111a) that the purpose of the defense—to insulate government procurement decisions from considerations of potential future tort liability—would be subverted by allowing a contractor to require government reimbursement of tort damages that the contractor could have avoided by invoking the defense. The court also agreed (*id.* at 76a-77a, 111a-113a) that petitioners could have invoked the government contractor defense to avoid all liability in the prior Agent Orange litigation, just as they invoked it to avoid liability to plaintiffs who opted out of the class-action settlement. Thus, the court concluded (*id.* at 80a, 115a) that petitioners could not prevail in this litigation because recovery against the government would be inconsistent with the rationale of the government contractor defense.

3. The court of appeals consolidated petitioners' cases and affirmed. Pet. App. 1a-33a. The court agreed (*id.* at 18a-19a & n.8) that scientific proof of dioxin-related injuries was "sparse," and that, in any event, "the facts would have to be stretched" to conclude that the government had made and breached an implied warranty of specifications that would permit petitioners to recover their litigation and settlement costs. The court chose to rest its decision, how-

ever, on the ground that petitioners "cannot prove that their damages were caused by the government's alleged breach * * * because [petitioners] were protected from liability to the Agent Orange plaintiffs by the government contractor defense." *Id.* at 19a-20a. Observing that petitioners "successfully argued on three separate occasions that the government contractor defense shielded them from liability for the veterans' tort claims," the court concluded that "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed" against them. *Id.* at 23a. Thus, in the court's view, petitioners made a voluntary decision to settle rather than to press their defense in litigation, and their contributions to the settlement fund resulted from that decision, not from any breach of a contractual duty by the government. *Ibid.*

The court of appeals also rejected (Pet. App. 28a-33a) petitioner Thompson's argument that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, created an implied contractual commitment by the government to indemnify DPA contractors for losses arising from tort suits brought by third parties. Like the Claims Court (and the district court that approved the class action settlement), the court concluded (Pet. App. 33a) that Section 707's protection "extends no further than the risk imposed by" Section 101(a) of the DPA, which authorizes the President to require that performance under defense contracts "take priority over performance under any other contract or order." 50 U.S.C. App. 2071(a). The court thus interpreted Section 707 to provide only "a defense for a DPA contractor against a suit

by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." Pet. App. 29a. "Accordingly, invocation of the DPA by the government * * * did not give rise to an implied-in-fact contractual obligation * * * to indemnify Thompson for its contribution to the Agent Orange settlement fund." *Id.* at 33a.

Judge Plager dissented. Pet. App. 34a-46a. In his view, approval of the Agent Orange settlement and the uncertain scope of the government contractor defense at the time of the settlement made it impossible to conclude that petitioners would have faced no liability had they gone to trial. *Id.* at 35a-40a. Judge Plager would also have read Section 707 of the DPA as a general "hold harmless" provision, under which the government was required to indemnify petitioner Thompson for any damages, including third-party tort liability, arising out of Thompson's production of Agent Orange. Pet. App. 43a-45a.

ARGUMENT

Petitioners manufactured Agent Orange under contracts with the government. Years after the completion of performance under those contracts, petitioners were sued by third parties who claimed to have been injured by the government's military use of Agent Orange. In that litigation, petitioners properly raised the government contractor defense. The first district judge to consider the matter granted summary judgment for petitioners on the basis of that defense. That decision was withdrawn by a sec-

ond district judge, but both he and the Court of Appeals for the Second Circuit later relied in part on the defense in affirming a partial settlement of the litigation, in granting petitioners summary judgment against plaintiffs who opted out of the settlement, and in rejecting petitioners' third-party claims against the United States for indemnity and contribution. This Court denied further review of two of those decisions.[6] Petitioners have now reformulated their claims for reimbursement in the language of implied warranty and contractual indemnity.

1. Petitioners' primary contention is that they have been "barred from suing the government for breach of an implied warranty of specifications."[7] Pet. 12; see also Pet. 11. The courts below did not, however, "preclude[]" petitioners from bringing their breach

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[6] See *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 795-799, 843-850 (E.D.N.Y. 1984) (approving settlement), aff'd, 818 F.2d 145, 173-174 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1263-1264 (E.D.N.Y. 1985) (dismissing opt-out cases), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1221, 1223 (E.D.N.Y. 1985) (dismissing third-party claims against the United States), aff'd, 818 F.2d 204, 210 (2d Cir. 1987).

[7] As noted above (see note 3, *supra*), petitioners do not renew in this Court their claims based on an implied obligation to divulge superior knowledge, and petitioner Hercules does not renew its claims based on implied obligations to act in good faith and to exercise due care. Cf. Pet. 8 n.7. Because the petition presents no question with respect to those claims, we do not address them.

of contract claim (Pet. i). Rather, as the court of appeals pointed out (Pet. App. 18a), the Claims Court rejected that claim on the merits, for three independent reasons: (i) because any implied warranty of specifications that might be found would not provide for the kind of recovery sought by petitioners, (ii) because the absence of scientific evidence regarding the consequences of dioxin exposure would preclude a finding that any such warranty was breached, and (iii) because the availability of the government contractor defense in the prior tort litigation would preclude a finding that petitioners' damages were caused by the government's alleged breach of such a warranty. The court of appeals indicated its likely agreement with the first two holdings, although it explicitly reached and affirmed only the third. *Id.* at 18a-20a & n.8. Any of the trial court's grounds is sufficient to support the judgment below.

a. Petitioners concede that their contracts with the government included no express warranty or indemnity of any kind. See Pet. App. 19a n.8. They argue instead (Pet. 12-13) that such a provision was implied in fact, and that the Claims Court's decision to the contrary (Pet. App. 66a, 98a-99a) conflicts with this Court's decision in *United States* v. *Spearin*, 248 U.S. 132 (1918).[8]

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[8] The Court of Federal Claims' jurisdiction under 28 U.S.C. 1491 extends only to contractual obligations that are either express or implied in fact; it does not reach obligations that are "implied in law." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); see also *Lopez* v. *A.C. & S., Inc.*, 858 F.2d 712, 714-715 (Fed. Cir. 1988), cert. denied, 491 U.S. 904 (1989) (implied warranty claims by suppliers of asbestos insulation).

Spearin involved a contractor who agreed to build a drydock according to detailed plans provided by the Navy. The plans called for the contractor to relocate a sewer in a specific manner, which he did. A defect in the Navy's plan of the existing sewer caused the relocation to be unsatisfactory, leading to additional costs and a dispute over completion of the contract. 248 U.S. at 133-135. The contractor sued, and this Court upheld a judgment in his favor for costs and lost profits. *Id.* at 138-139. Noting that the contractor had no knowledge of the plan defect and that his independent investigation of the site was adequate under the circumstances (*id.* at 134-135, 137), the Court held that the government's "insertion [into the contract specifications] of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate."

The facts of this case are remote from those of *Spearin*. Petitioners do not claim direct contract damages based on a contention that some defect in the government's specifications rendered the manufacture of Agent Orange more difficult or expensive than they expected, or caused the product, although properly manufactured, to be unfit for its intended use. Rather, they claim remote and consequential damages arising from the settlement of unproven third-party tort claims related to the government's use of the Agent Orange produced. The Claims Court recognized that distinction when it explained (Pet. App. 65a-66a, 98a-99a; emphasis added) that even if the facts might present a triable issue of fact concerning the existence of an implied *warranty* under

Spearin, they could not plausibly "be stretched so far as to support the theory that the parties came to a meeting of the minds that there would be an *indemnification* agreement between them if the implied warranty of specifications was alleged, but never proven, to [have been] violated."

The court of appeals agreed that "the facts would have to be stretched" to support petitioners' theory. Pet. App. 18a. The court explained (*id.* at 19a n.8) that under *Feres* v. *United States*, 340 U.S. 135 (1950), the government is protected from tort liability for injuries to members of the armed services arising out of their military service. Under *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977), that protection extends to suits for indemnity by government contractors who manufacture military equipment under specifications supplied by the government, because allowing indirect recovery against the government would undermine *Feres*' prohibition of direct suits by service members. For the same reason, the court found it "difficult to envision the circumstances under which a court could find an implied-in-fact agreement on the part of the government to provide the kind of indemnity for which [petitioners] argue." Pet. App. 19a n.8. There is no reason for this Court to question the conclusion that petitioners' implied indemnity claim is too implausible to present a genuine issue of fact for trial.[9]

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[9] Even express agreements to indemnify a government contractor for open-ended liabilities are extraordinary, and in the absence of some specific statutory provision it is questionable whether government agents would have had the authority to agree to the indemnity suggested by petitioners. Compare, *e.g.*, 42 U.S.C. 2210(d) and (h) (indemnification of nuclear contractors); 42 U.S.C. 9619 (President "may agree to hold

b. Even if petitioners' implied indemnity claim raised a triable issue of fact, the Claims Court correctly concluded (Pet. App. 64a-65a, 96a-97a) that under the facts of this case petitioners would not be able to show any breach by the government of an underlying warranty of specifications. As the court pointed out, despite the "many and varied decisions regarding the veterans' suits against the herbicide manufacturers" (*id.* at 65a, 97a), no court has ever found credible evidence that exposure to Agent Orange caused any of the injuries complained of by the individual tort plaintiffs.

Chief Judge Weinstein, who expressed considerable sympathy for the veteran plaintiffs (see, *e.g.*, *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 857 (E.D.N.Y. 1984)), nonetheless approved settlement of their claims in part because he thought the case probably "without merit," *ibid.*, in view of the fact that "an enormous scientific effort to be helpful on causation ha[d], from the plaintiffs' point of view, left the case at best open." *Id.* at 795. In later granting summary judgment against those plaintiffs who opted out of the settlement, the Chief Judge explained that "years of discovery and tens of millions of dollars spent by the government and

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harmless and indemnify" certain "response action contractor[s]" under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)); and 50 U.S.C. 1431 (President may enter into defense contracts during emergencies without regard to most normal statutory restrictions) with, *e.g.*, the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(B) (no officer or employee may commit the government to any "contract or obligation for the payment of money before an appropriation is made unless authorized by law").

others on research ha[d] not yielded any competent evidence indicating a genuine issue of fact about causation." *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985). That judgment was echoed twice by the court of appeals. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 171-173 (2d Cir. 1987) (opinion approving settlement), cert. denied, 484 U.S. 1004 (1988); 818 F.2d 187, 193-194 (opinion approving dismissal of "opt-out" plaintiffs' claims) (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988). And time has produced no new evidence that would call the courts' conclusion into question. See *Ivy* v. *Diamond Shamrock Chemicals Co. (In re "Agent Orange" Product Liability Litigation)*, 996 F.2d 1425, 1436-1437 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125 (1994) (reviewing recent evidence and refusing to reopen settlement). There is no reason for this Court to question the Claims Court's decision (Pet. App. 68a), and the court of appeals' suggestion (*id.* at 18a), that petitioners' allegation of breach of warranty in this case raised no genuine issue for trial.

c. Finally, both the Claims Court (Pet. App. 67a-78a, 99a-100a, 104a-115a) and the court of appeals (*id.* at 19a-25a) held that petitioners could not "prove that [any] damages were caused by the government's alleged breach of an implied warranty of specifications because they were protected from liability to the Agent Orange plaintiffs by the government contractor defense." *Id.* at 19a-20a.

As the court of appeals pointed out (Pet. App. 22a), the courts that considered the Agent Orange tort litigation all ultimately concluded that the government contractor defense protected petitioners from

liability. The district court initially granted summary judgment for petitioners on the basis of that defense. See *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 796 (E.D.N.Y. 1980) (Pratt, J.) (indicating willingness to invoke defense once elements proved); *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263, 1272-1274 (E.D.N.Y. 1983) (granting motions for summary judgment). Chief Judge Weinstein retracted that action after assuming responsibility for the case, see Pet. App. 7a, but he later discussed the potential applicability of the defense in approving the settlement agreement, see 597 F. Supp. at 795-799, 843-850, and he relied on its applicability in dismissing the claims of those plaintiffs who opted out of the settlement. 611 F. Supp. at 1263-1264 ("Plaintiffs are unable to overcome defendants' government contract defense."). The Second Circuit affirmed in each instance; indeed, it based its decision with respect to the opt-out plaintiffs solely on the government contractor defense. See 818 F.2d at 173-174 (settlement opinion) (defense a "final and in our view impossible, hurdle to surmount"); *id.* at 189-194 (opt-out opinion), 192 ("We need not define the precise contours of the defense because we believe that under any formulation * * * the defendants here were entitled to summary judgment."). See also *id.* at 209 (opinion on manufacturers' tort indemnity claims against the United States); *Ivy* v. *Diamond Shamrock Chemicals Co.*, 996 F.2d at 1436. The long history of prior litigation provides solid support for the conclusion of the court below that "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed against [petitioners]." Pet. App. 23a.

That conclusion is also logically compelled by the parallel requirements of the government contractor defense and the warranty-of-specifications theory advanced by petitioners in this case. Petitioners' proposed warranty theory requires them to establish that they manufactured Agent Orange in compliance with precise design specifications devised and drafted by the government, and that the government knew more than they did about the part of the design that caused the alleged defect in the resulting product. Pet. 12. By comparison, the government contractor defense applies whenever the United States approved reasonably precise specifications, the contractor's work conformed to those specifications, and the contractor warned the United States about any hazards known to the contractor but not to the United States. Pet. App. 21a-22a, citing *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 512 (1988).

Because the elements required to recover under the alleged warranty and those required to invoke the government contractor defense are essentially the same, if a contractor can establish the grounds for the existence of a warranty of specifications under petitioners' theory, it will necessarily have established the elements of a complete defense to any tort claim that might give rise to damages under the warranty. Conversely, if a tort plaintiff suing a contractor succeeds in recovering damages despite invocation of the government contractor defense, then whatever element of that defense the contractor failed to establish will also preclude it from recovering under any purported warranty. See also *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 204, 208-209 (2d Cir. 1987) (applying similar analysis to petitioners' tort indemnity claim against the United States).

Petitioners argue (Pet. 13-16) that although they settled the underlying tort litigation, rather than relying on the government contractor defense to preclude liability, they are entitled to recover for breach of an alleged warranty of specifications because their settlement was "reasonable" (Pet. 14). That argument reflects a misunderstanding of the structure of government contract law, which offers different protections to contractors in different situations. In *Spearin*, the contractor could be protected only by allowing recovery of additional costs and lost profits related to completion of the contract. In this case, if petitioners followed government design specifications and did not withhold information about potential hazards unknown to the government, their full protection lay in the government contractor defense. Nothing in *Spearin* supports the conclusion that the United States implicitly warranted to reimburse petitioners for costs involved in litigating and settling tort suits as to which the law already provided a complete defense. And no such result can fairly be inferred from the terms of routine supply contracts like those at issue here.

Petitioners' theory would cede to government contractors the power to create indirect governmental liability to tort plaintiffs, allowing such plaintiffs to accomplish by suing the contractor what they could not accomplish by suing the government directly. It would also encourage military contractors to settle meritless product liability suits and then seek to recover the related costs through breach of contract claims against the United States.

At bottom, petitioners' argument may be that the United States should be liable in contract because

petitioners' agreement to settle the class action was not truly voluntary, petitioners having been pressured by Chief Judge Weinstein's refusal to enter final judgment on the original order granting summary judgment, and his subsequent encouragement of settlement. But such a settlement cannot establish government liability where none otherwise exists—particularly where the courts eventually determined not only that there was no defect in the Agent Orange specifications, but also that the government contractor defense immunized petitioners from suit.[10]

Finally, even petitioners' own authorities hold that an implied indemnity will not always cover a settlement based on nothing more than potential liability. For instance, a showing of *actual* liability will be

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[10] Petitioners also contend (Pet. 16-17) that this case merits review because suppliers will either raise their prices or withdraw from competition for government contracts because third-party tort liability costs "will no longer be recoverable in contract from the United States." But those costs have never been recoverable against the government, in contract or otherwise. As this Court has explicitly recognized, contractors have long been on notice that they should take any risk of tort liability into account in negotiating government contracts, because of the government's immunity from tort-law contribution. *Stencel Aero Eng'g Corp.*, 431 U.S. at 674 & n.8. They can hardly claim surprise that the same principles apply to preclude novel claims of liability under implied contractual indemnities. A contractor's risk of tort liability is controlled instead through precisely the mechanism at issue here, the government contractor defense. That defense is carefully calibrated to shield suppliers who follow government design specifications in good faith, without destroying their incentive to develop and share with the government information relating to risks or hazards inherent in the government's designs. See generally *Boyle*, 487 U.S. at 511-513.

required when the "theory on which the original plaintiff had proceeded appeared questionable as a basis for liability." *Parfait* v. *Jahncke Service, Inc.*, 484 F.2d 296, 304-305 (5th Cir. 1973) (discussing *Whisenant* v. *Brewster-Bartle Offshore Co.*, 446 F.2d 394, 401-403 (5th Cir. 1971)), cert. denied, 415 U.S. 957 (1974); see also *Tankrederiet Gefion A/S* v. *Hyman-Michaels Co.*, 406 F.2d 1039, 1042 (6th Cir. 1969) (adopting "general rule" requiring showing of actual liability). The courts below carefully considered the facts of this case, the various doctrines at issue, and the course of proceedings in the previous tort actions. They determined that, even if petitioners' contracts with the government included an implied indemnity for third-party tort damages, the chances that petitioners faced actual liability in that action were not only "questionable," but were so remote that petitioners' claim of indemnifiable damages did not present a triable issue of fact. See Pet. App. 18a-23a, 64a-78a, 96a-100a, 104a-115a. That fact-bound conclusion necessarily implies that petitioners' settlement could not have been "reasonable" within the meaning of the indemnity rules they cite, and it merits no further review by this Court.

2. Petitioners contend (Pet. 19-22) that Section 707 of the Defense Production Act, 50 U.S.C. App. 2157, and the government's "compulsion" of petitioners' Agent Orange production under the DPA, together "create an implied-in-fact agreement to indemnify petitioners for the damages they suffered in the Agent Orange litigation." [11] Petitioner Hercules did

[11] We note that the nature or extent of the government's "compulsion" is by no means settled, particularly with respect to petitioner Hercules. See Pet. App. 3a-4a; compare *id.* at

not advance that claim either in the Court of Federal Claims or in the court of appeals, and it is properly before this Court only on behalf of petitioner Thompson. See Pet. App. 14a-15a, 28a. The court of appeals correctly rejected Thompson's argument. Pet. App. 28a-33a.

a. As the court of appeals held (Pet. App. 29a-33a), the language and statutory context of Section 707 indicate that it protects contractors from claims arising out of a DPA order's displacement of work for other customers, not from tort liability to third parties who claim to have been injured by products manufactured for the government. Section 101(a)(1) of the DPA, 50 U.S.C. App. 2071(a)(1) (emphasis added), authorizes the President

> to require that performance under [defense] contracts or orders * * * shall take *priority over* performance under any other contract or order, and, *for the purpose of assuring such priority*, to require acceptance and performance of such contracts or orders *in preference to other contracts or orders* by any person he finds to be capable of their performance.

Section 707 (50 U.S.C. App. 2157) complements that core directive by providing further that:

> No person shall be held liable for damages or penalties for any act or failure to act resulting

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49a-50a with *id.* at 84a-85a; see also C.A. App. 670-677; *United States v. Vertac Chemical Corp.*, Nos. 94-1946 etc. (8th Cir. Jan. 31, 1995), slip op. 3 ("In 1964 * * * Hercules submitted and won competitive bids to supply the United States with * * * Agent Orange."). Because the case was resolved on summary judgment, we must accept petitioners' allegations of compulsion as true for present purposes.

> directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act * * *, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid. No person shall discriminate against orders or contracts to which priority is assigned * * * under any rule, regulation, or order * * * by charging higher prices * * * or in any other manner.

Construing the two provisions together, the court of appeals properly concluded that Congress did not intend Section 707 of the Act to confer an immunity broader than the risk imposed by Section 101. And, as the court explained (Pet. App. 31a), while that risk may include the need to break or delay performance under contracts with third parties in order to give preference to a government order, "it does not include the risk that the product produced under the DPA contract will be inherently unsafe to users." [12] Every other court that has considered the issue has reached the same conclusion. See *id.* at 100a-102a (Court of Federal Claims); *Eastern Air Lines, Inc.* v. *McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. at 843-845 (opinion approving settlement); see also *United States* v. *Vertac Chemical Corp.*, Nos. 94-1946 etc. (8th Cir. Jan. 31, 1995), slip op. 16-17 (citing decision below and hold-

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[12] As the court pointed out (Pet. App. 32a), the second sentence of Section 707, which refers specifically to contracts assigned priority under Section 101, supports the court's reading of the shield provision. The court did not address the significance of the first sentence's "notwithstanding" clause, which might suggest an even more limited construction.

ing that Section 707 confers no immunity from liability under CERCLA).

b. Even if Section 707 should have shielded petitioners from tort liability for their production of Agent Orange, petitioner Thompson's argument (Pet. 20) that the statute evinces an "implied-in-fact agreement" to *indemnify* it for such liability is implausible. Whatever its scope, Section 707 is plainly intended to provide a defense to liability in third-party lawsuits against a DPA contractor, not to provide the supplier with a breach of contract action against the United States. It was therefore plausible for petitioners to advance their Section 707 claim as a defense to liability in the class action litigation: the DPA shield provision would have functioned, on petitioners' interpretation, like a somewhat more absolute version of the government contractor defense. Petitioners failed to persuade the district court in that action (see 597 F. Supp. at 843-845), however, and in the end they compromised the action. Petitioner Thompson cannot now prevail on the much more remarkable claim that Congress, having provided (in Thompson's view) a complete and explicit shield from tort liability in Section 707, also agreed, *by implication*, to indemnify Thompson fully if it chose instead to settle the plaintiffs' claims. As the court of appeals observed (Pet. App. 32a-33a), "if Congress had intended section 707 to impose upon the government the kind of liability asserted by Thompson, it would have said so in clear and unequivocal terms." [13]

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[13] In addition, as the Claims Court noted (Pet. App. 102a-103a), even if such an agreement to indemnify could be inferred, it would probably violate the Anti-Deficiency Act, 31 U.S.C. 1341. See note 9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID S. FISHBACK
ALFRED R. MOLLIN
MICHAEL T. MCCAUL
Attorneys

MARCH 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20053